

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TEXAS
TYLER DIVISION

WI-LAN, INC.

Plaintiff,

v.

ALCATEL-LUCENT USA INC.;
TELEFONAKTIEBOLAGET LM
ERICSSON; ERICSSON INC.; SONY
ERICSSON MOBILE COMMUNICATIONS
AB; SONY ERICSSON MOBILE
COMMUNICATIONS (USA) INS.; HTC
CORPORATION; HTC AMERICA, INC.;
EXEDEA INC.; LG ELECTRONICS, INC.;
LG ELECTRONICS MOBILECOMM U.S.A.,
INC.; LG ELECTRONICS U.S.A., INC.

Defendants.

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Civil Action No. 6:10-cv-521

**HTC CORPORATION, HTC AMERICA, INC. AND EXEDEA, INC.'S REPLY BRIEF
IN RESPONSE TO WI-LAN, INC.'S OPPOSITION TO HTC CORPORATION, HTC
AMERICA, INC. AND EXEDEA, INC.'S MOTION TO SEVER CLAIMS**

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Wi-LAN filed this patent suit on October 5, 2010, joining a total of eleven defendants alleging infringement of one or more of four U.S. patents, namely, U.S. Patent Nos. 6,088,326 ("the '326"), 6,195,327 ("the '327"), 6,222,819 ("the '819"), and 6,381,211 ("the'211") (collectively, the "patents-in-suit"). HTC filed its Motion to Sever Claims (Dkt. No. 72) ("MTS") in connection with its Motion to Transfer Venue to the Southern District of California ("MTT") (Dkt. No. 73).

Wi-LAN divides the defendants into four defendant groups: HTC, Sony Ericsson, Ericsson and Alcatel-Lucent. According to Wi-LAN, two of these four groups are related - Sony Ericsson is partially owned by Ericsson. According to the Complaint and Wi-LAN's admission in the Opposition, the base station defendants, namely, Alcatel-Lucent and Ericsson, are accused of infringing only the '326, '327 and '819 patents, while the handset defendants, namely, Sony Ericsson and HTC, are accused of infringing only the '211 and '819 patents.

I. APPLICABLE LAW

Although Fed. R. Civ. P. 20(a)(2) encourages "joinder of claims, parties and remedies," a plaintiff does not have an unlimited right to join claims against unrelated defendants. *See United Mine Workers v. Gibbs*, 383 U.S. 715, 724 (1966). The Federal Rules only permit "the broadest possible scope of action consistent with fairness to the parties." *Id.* In *Acevedo v. Allsup's Convenience Stores Inc.*, 600 F.3d 516 (5th Cir. 2010), the Fifth Circuit visited the issue of permissive joinder of plaintiffs under Fed. R. Civ. P. 20(a)(1), and held that permissive joinder of plaintiffs is allowed if both prongs of a two-prong test are satisfied: "(1) their claims arise out of the 'same transaction, occurrence, or series of transactions or occurrences' and when (2) there is at least one common question of law or fact linking all claims." *Id.* at 521. Because the language of Fed. R. Civ. P 20(a)(2) regarding permissive joinder of defendants is exactly the

same as that of Fed. R. Civ. P. 20(a)(1) regarding permissive joinder of plaintiffs, there is no reason why the holding of *Acevedo* should not apply to the permissive joinder of defendants.

Various district courts have reached different conclusions by applying Fed. R. Civ. P. 20(a)(2) to motions to sever. "[T]he Fifth Circuit has yet to endorse a specific test with regard to the first requirement of Rule 20(a)(2)." *Mannatech, Inc. v. Country Life, LLC*, Civil Action No. 3:10-CV-533-O, 2010 WL 2944574, at *1 (N.D.Tex July 26, 2010). This Court applied Fed. R. Civ. P. 20(a)(2) to a patent infringement case in *MyMail, Ltd. v. America Online, Inc.*, 223 F.R.D. 455 (E.D.Tex. 2004), and denied a motion by one group of defendants ("the UOL Defendants") to sever. *Id.* at 458. It is important to point out some of the crucial underlying facts in *MyMail*. First, the defendants in *MyMail* were all accused of infringing the same patent. *Id.* at 457. Second, the plaintiff "also alleges that the UOL Defendants have utilized shared resources, such as dial-up Internet access numbers, with the other defendants." *Id.* Third, "[n]either side disputes that questions of law or fact common to all defendants will arise in this case." *Id.* at 456. Although the Court denied the UOL Defendants' motion to sever, it did point out that "[i]t is possible that severance could be appropriate if the defendants' methods or products were dramatically different." *Id.* at 457 (emphasis added).

Wi-LAN argues that "HTC relied exclusively on out-of-district decisions, while largely ignoring the standard that has been adopted in this district." (Opp. at 8). This is not true. HTC's Motion to Sever should be granted even if this Court relies exclusively on *MyMail*.

II. ARGUMENT

A. Wi-LAN Asserts Separate Categories Of Claims Against Separate Groups Of Defendants With Separate Categories Of Products

Of the four patents-in-suit, Wi-LAN alleges that the handset defendants, Sony Ericsson and HTC, infringe only two, namely, the '211 and '819 patents. (Complaint ¶¶ 39-46, 54-61).

Wi-LAN admits that the '326 and '327 patents are relevant to base stations and not to handsets. (Opp. at 6-7). The '326 and '327 patents are asserted only against the base station defendants, Alcatel-Lucent and Ericsson. (Complaint ¶¶ 15-30).

The only patent among the four patents-in-suit asserted against all four defendant groups is the '819 patent. Wi-LAN admits that the '819 patent is asserted against the base station defendants for their allegedly infringing "3GPP compliant" base stations and against the handset defendants for their allegedly infringing "3GPP compliant" handsets. (Opp. at 6-7). Inherent in Wi-LAN's admission is that claims against the handset defendants and claims against the base station defendants are separate and distinct. The handset claims against the handset defendants and the base station claims against the base station defendants must rely on separate and distinct infringement theories. The invalidity defenses against each claim will require unique facts and methods of proof, depending on whether the claim is related to a handset or a base station.

Wi-LAN states that the '211 patent is a continuation of the '326 patent, but the Complaint asserts the '326 patent only against the base station defendants and the '211 patent only against the handset defendants. (Opp. at 6). Wi-LAN argues that the four patents-in-suit are related and all the defendants' accused products are similar because the 3GPP standard is "central to Wi-LAN's infringement allegations." (Opp. at 5-7).

B. The Accused HTC Products Are Dramatically Different From the Base Station Products Of Alcatel-Lucent And Ericsson

The following hypothetical illustrates the absurdity of Wi-LAN's logic: An airport jetway must be able to connect with an aircraft door. Presumably, there exists an industrial standard governing the jetway's connection with the aircraft door. Are the jetway and the aircraft door similar products just because they must comply with the same standard? If a plaintiff files a

patent infringement suit against a jetway maker and an aircraft maker, is the claim against the jetway maker not severable from the claim against the aircraft maker?

It is indisputable that base stations and handsets are fundamentally different categories of products. Compliance with a common standard does not obscure the fact that base stations are different devices from handsets. Wi-LAN admits that "the similarity or dissimilarity between the defendants' accused products was of primary concern," (Opp. at 11), and nevertheless argues that base stations and handsets are similar products, relying on "information presently available." (Opp. at 10). However, at this early stage of the litigation, an investigation has not yet been conducted on this issue. Although it is Wi-LAN's burden to demonstrate that it has properly joined all defendants, Wi-LAN does not present any evidence to support its conclusory statement that the accused products are "quite similar," (Opp. at 10), other than self-serving allegations from the Complaint. Because the claims and defenses related to base stations are necessarily different from the claims and defenses related to handsets, questions of law and fact are not common to all defendants. The joinder of HTC with the base station defendants is improper under Fed. R. Civ. P. 20(a)(2)(B).

C. HTC Has No Relationship With Any Other Defendant

HTC does not collaborate with Sony Ericsson in the design, development, manufacturing or marketing of its handsets. Neither does HTC collaborate with any of the base station defendants in the design, development, manufacturing or marketing of its handsets. Unlike the defendants in *MyMail*, HTC does not utilize any shared resources with any other defendant. In fact, HTC is a direct competitor of Sony Ericsson in the handset market in the United States. (Motion to Sever, Maron Decl. ¶ 4).

As Wi-LAN points out, Sony Ericsson is partially owned by Ericsson. (Opp. at 4). There may be strategic or tactical reasons as to why Sony Ericsson has not sought to sever its

infringement claims from those of the base station defendants. HTC is not in a position to speculate as to why Sony Ericsson has not sought to sever, but Sony Ericsson's decision not to seek severance at this time should have no relevance to HTC's Motion to Sever. In *MyMail*, the UOL Defendants collaborated as a group in seeking severance from the remaining defendants. *MyMail*, 223 F.R.D. at 456. In fact, all of the UOL Defendants were subsidiaries of one company, United Online, Inc., *id.*, and had every reason or motive to collaborate as a group to sever their claims from those of the other defendants. In the present suit, Sony Ericsson has no relationship whatsoever with HTC, (Motion to Sever, Maron Decl. ¶ 3), but has at least some relationship with Ericsson, one of the base station defendants.

D. This Court Should Exercise Its Discretion To Sever HTC

Wi-LAN argues that HTC's request for severance is "entirely premature" at this stage. (Opp. at 15-16). This argument has no merit because HTC filed a Motion to Transfer (Dkt. No. 73) in connection with the Motion to Sever on the same day. (Dkt. No. 72). If HTC fails in its Motion to Sever but succeeds in its Motion to Transfer, then Wi-LAN will have to litigate the entire case against all the defendants in the Southern District of California. Although this Court has the discretion to do so, HTC is not requesting that the entire case be transferred to the Southern District of California. Therefore, the Motion to Sever is not premature.

Dated: February 24, 2011

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned certifies that on this 24th day of February, 2011, counsel of record who are deemed to have consented to electronic service are being served with a copy of this document by electronic mail.

/s/ Eric H. Findlay _____
Eric H. Findlay